BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Comprehensive review of revenue requirements and rate stabilization plan of SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.	DOCKET NO. 920260-TL
In Re: Investigation into the integrity of SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S repair service activities and reports.	DOCKET NO. 910163-TL
In Re: Investigation into SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S compliance with Rule 25-4.110(2), F.A.C., Rebates.	DOCKET NO. 910727-TL
In Re: Show cause proceeding against SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY for misbilling customers.	DOCKET NO. 900960-TL ORDER NO. PSC-93-0812-FOF-TL ISSUED: May 26, 1993

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
THOMAS M. BEARD
SUSAN F. CLARK
JULIA L. JOHNSON
LUIS J. LAUREDO

ORDER DENYING BELLSOUTH TELECOMMUNICATIONS, INC.'S PETITION FOR REVIEW OF ORDER NO. PSC-93-0540-PCO-TL

BY THE COMMISSION:

On November 13, 1991, the National Association of Regulatory Utility Commissioners approved a resolution authorizing multi-state audits of the seven Regional Bell Operating Companies, including BellSouth Corporation and its affiliates, which operate in nine southeastern states. An audit team assembled from among these states proposed, and this Commission approved, that the audit be conducted under the authority of the Florida Commission.

On October 25, 1992, the audit team made a data request of BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company (SBT). SBT refused to provide full access to the requested materials and, on February 2, 1993, this Commission voted to require SBT to respond to the data request, in writing, by February 10, 1993. Our decision was codified by Order No. PSC-93-0424-FOF-TL, issued March 22, 1993.

On February 10, 1993, SBT responded to the Commission's February 2 decision by objecting to the audit team's request for certain records of its affiliates and certain non-Florida information. On March 5, 1993, the Staff of this Commission moved to compel complete access to the following records:

AFFILIATE RECORDS

Request No.	Affiliate(s)
1-019	BellSouth Information Networks
2-001	Sunlink (partner CSL Chastain)
2-002	BellSouth Capital Funding Corp.
2-004	BellSouth Resources, Inc.
2-006	Data Serve Financial Services
3-008	BAPCO
3-016	LM Berry, Stephens Graphics, TechSouth, BellSouth Marketing Programs, Intelligent Media Services
3-023	BellSouth Enterprises, Inc.

NON-FLORIDA RECORDS

Request No.	Records Requested
1-013	Fiber Based Trials
3-002	Director Revenue
3-007	Revenue Sharing Factor
3-001	BAPCO Allocation Matrix
4-009.1	Billing and Collection Data

SBT responded to Staff's motion to compel on March 17, 1993. SBT's response basically consisted of two arguments. First, SBT

argued that the breadth of the audit team's data request is not "reasonable" in accord with Section 364.183(1), Florida Statutes. Second, SBT argued that many of the records requested by the audit team are in the possession of foreign affiliates that have no connection with SBT's operations in Florida. Accordingly, SBT contended that the requests were unconstitutionally broad.

By Order No. PSC-93-0540-PCO-TL, issued April 9, 1993, the Prehearing Officer found that, under Sections 364.183(1), 364.18(2), 364.17, and 350.117(1), Florida Statutes, the Commission had the authority to access the requested records. The Prehearing Officer also determined that "'[r]easonable', as used in Section 364.183(1), Florida Statutes, modifies 'access' in terms of time and place, not the quantity or quality of documents to which this Commission has access." Accordingly, the Prehearing Officer rejected SBT's first argument and directed it to provide access to the records.

As for SBT's second argument, while not directly passing on SBT's constitutional argument, the Prehearing Officer noted that the cases cited by SBT all involved attempts to invoke personal jurisdiction over foreign entities. Since the audit request was made directly of SBT, the Prehearing Officer concluded that SBT's argument regarding the exercise of personal jurisdiction over such entities was irrelevant.

On April 19, 1993, SBT filed a petition for review of Order No. PSC-93-0540-PCO-TL. According to its petition, SBT believes that it is entitled to a de novo review. In support thereof, SBT points to Rule 25-22.038(2), Florida Administrative Code, which states that "[a] party who is adversely affected by any such order or notice [of a Prehearing Officer] may seek reconsideration by the prehearing officer, or review by the Commission panel assigned to the proceeding, by filing a motion in support thereof within ten (10) days of service of the notice or order." (Emphasis added.) SBT places a distinction on the use of the term "review" that we do not. Even assuming that the distinction drawn by SBT is valid, "review" does not connote "de novo". Indeed, the standard applied by the Commission when reviewing a Prehearing Officer's order is the same as that applied for any other matter on reconsideration: has the Prehearing Officer failed to consider some matter or made any mistake of fact or law. A petition for review is not an appropriate vehicle to introduce issues or factual matters for the first time.

Although SBT believes that it is entitled to a de novo review, it nevertheless argues that, even under the standard employed by this Commission, "it is evident that the Prehearing Officer has made errors of law and fact in reaching the decision under review." According to SBT, the Prehearing Officer "overlooked the fact that Southern Bell is unable to compel its affiliates to produce the requested information." In support of this argument, SBT offers the affidavit of Karen Kaetz. This affidavit was not before the Prehearing Officer at the time the decision was rendered. Accordingly, it is improper as grounds for reconsideration. Even so, we do not find the affidavit persuasive. In her affidavit, Ms. Kaetz states that pursuant to "standard practice with regard to all audit team requests which sought information not in the possession, custody or control of" SBT, she directed the data requests to the designated recordkeepers of the affiliates in question, and these affiliates "voluntarily agreed" to provide some of the requested records. If SBT is able to produce some of the records in the possession of its affiliates, it is just as able to produce other records in the possession of these affiliates, as discussed more fully hereunder.

Next, SBT attacked a discussion in Order No. PSC-93-0540-PCO-TL, contained in a footnote, by which the present situation was analogized to the law regarding production under Rule 34(a), F.R.C.P. Although the footnote is neither dispositive of the matter nor the rationale behind the decision, SBT's arguments in this regard are addressed, below.

SBT argues that In Re Folding Carton Antitrust Litigation, 76 F.R.D. 420 (N.D.Ill. 1977), and Zervos v. S.S. Sam Houston, 79 F.R.D. 593 (S.D.N.Y. 1978), are factually distinguishable from the case at hand. Without getting too deeply mired in the alleged distinctions, we note that these cases were not cited for their factual underpinnings. Folding Carton was cited solely for the proposition that "a party need not have actual possession of documents to be deemed in control of them." Zervos, on the other hand, merely stands for the principle that the controlling issue regarding whether to compel production is not whether the records are within the jurisdiction of the tribunal, but whether the party from whom production was requested has "control" over the records. That these cases may be factually distinguishable from the case at hand in no way dilutes the general principles that they represent. SBT's arguments regarding these cases are, therefore, inapposite.

SBT also argues that Camden Iron & Metal v. Marubeni America Corp., 138 F.R.D. 438 (D.N.J. 1991) is distinguishable because the Court found that the two corporations had "acted as one", the same standard applied by the Court in Medivision v. Dept. of Health & Rehab. Serv., 488 So. 2d 886 (Fla. 1st DCA 1986). According to SBT, there is no evidence that it and its affiliates have acted as one in any of the activities at issue in this case. We do not find this argument persuasive. Most of the affiliates from which records are sought provide products and services to SBT, some of which are indispensable with regard to its provision of telecommunications services. There are transactions between these affiliates and allocations of costs between and among the affiliates as well as between and among regulated and unregulated activities. At the center stands BellSouth Corporation (Bell), the parent company. Given the high level of inter-corporate activity, it is difficult to believe that there is not an equally high degree of horizontal and vertical integration between Bell and its various subsidiaries, including SBT, or that Bell does not or cannot exert control over its subsidiaries. Moreover, as the parent company, it is Bell's choice how to arrange its corporate structure, including what activities to spin off into separate corporate identities. The separate corporate identities were presumably created as a matter of convenience. Although it may be proper to use the separate corporate identities to limit the liability of the parent and/or its shareholders, we do not believe that evading lawful, effective regulation is a legitimate use of the corporate fiction.

Further, the Camden Iron Court did not limit production solely to where corporations are acting as one. In fact, the Court stated that:

> [W]here the litigating corporation is the subsidiary and the parent possesses the records, courts have found control to exist on the following alternate grounds:
>
> > (1) the alter ego doctrine which warranted "piercing the corporate veil";
> >
> > * * *
> >
> > (3) The relationship is such that the agent-subsidiary can secure documents of the principal-parent to meet its own business needs and documents helpful for use in litigation;

> (4) There is access to documents when the need arises in the ordinary course of business;
>
> * * *

Camden Iron, at 441-442 (citing Gerling Intern. Ins. Co. v. C.I.R., 839 F.2d 131, 140-141 (3d Cir. 1988).

The Court went on to discuss a number of indicia that the companies had acted as one, including the fact that records had previously been supplied, that profits on the deal in question were to be divided up at a later date, and that an employee had been transferred from the parent to the subsidiary for purposes of negotiating the deal. Accordingly, the Court held that:

> The facts of this case support a finding that defendant MAC has easy and customary access to . . . [its parent's] documents involving this transaction, and MAC possesses the ability to obtain such documents from . . . [its parent] for its usual business needs. **One such business need is to provide highly relevant documents in litigation.**

Camden Iron, at 443-444 (emphasis added).

Again, it is difficult to believe, and SBT has not argued, that it is not able to secure documents for its own business needs or for use in litigation, or that it has no access to documents when the need arises in the ordinary course of business. As noted above, SBT "volunteered" to supply some of the requested records. If it has control over these documents, it has control over the other documents requested by the audit team and must produce them.

Notwithstanding the above, the decision codified as Order No. PSC-93-0540-PCO-TL was not even based upon the rules of discovery or the cases cited in the footnote. The purpose of the footnote was merely to demonstrate that under Rule 34(a), F.R.C.P., records of nonparty parent corporations, nonparty subsidiary corporations, and nonparty affiliate corporations are generally considered to be within the "control" of a corporate party, regardless of whether the corporate party has actual possession and regardless of whether the records or the nonparty corporation are subject to the jurisdiction of the court. These cases establish a baseline: those

records that SBT would be required to produce if we were operating in a discovery mode. Under Sections 364.183(1), 364.18(2), 364.17, and 350.117(1), Florida Statutes, however, our authority to examine records of telecommunications companies and their affiliates is much broader than a party's right to production under the rules of discovery. If such records are accessible through discovery, they must surely be accessible through an audit by a regulatory body statutorily charged with ensuring that the ratepayers of telecommunications companies do not subsidize unregulated activities of the companies or their affiliates.

This Commission and, by extension, the audit team, must be able to examine the records of SBT's affiliates. If the audit team is limited to only those records "volunteered" by SBT, we will never be able to determine whether there are inappropriate transactions between affiliates, whether there are cross subsidies flowing between regulated and unregulated activities of SBT and its affiliates, and whether the prices for products and services supplied by SBT's affiliates are reasonable and prudent.

Based upon the discussion above, SBT has neither demonstrated that the Prehearing Officer overlooked any matter nor identified any mistake of fact or law in the decision codified as Order No. PSC-93-0540-PCO-TL. Accordingly, its petition for review is hereby denied. SBT shall provide access to the records within five working days of the date of this Order. If, however, SBT files a notice of appeal, this requirement shall automatically be stayed, pending the outcome of its appeal.

It is, therefore,

ORDERED by the Florida Public Service Commission that the petition for review of Order No. PSC-93-0540-PCO-TL filed by BellSouth Telecommunications, Inc. is hereby denied. It is further

ORDERED that BellSouth Telecommunications, Inc. shall provide access to the records in question within five (5) working days of the date of this Order. It is further

ORDERED that, if BellSouth Telecommunications, Inc. files a notice of appeal, the effect of this Order shall automatically be stayed pending the outcome of the appeal.

By ORDER of the Florida Public Service Commission this 26th day of May, 1993.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

RJP

Commissioner Lauredo dissented from the majority decision. Commissioner Lauredo believes that the scope of the audit is overly broad. Given that this is the first regional audit of its kind, Commissioner Lauredo believes that the Commission should reconsider the ruling of the Prehearing Officer and establish more judicious audit objectives and boundaries.

NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.